92-1542

Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

LORENZO W. TIJERINA,
Petitioner,

v.

YVONNE Q. STOWBRIDGE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI OF PETITIONER

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Dated: March 22, 1993

QUESTIONS PRESENTED

1. Whether or not petitioner's Fed. R. Civ. P. Rule 60(b) Motion was timely filed and supported with enough evidence to support petitioner's allegation that a fraud had been perpetrated upon the U.S. District Court by an officer of the Court, namely Mr. Ted Kavrukov, the respondent's "expert witness"?

2. Whether or not the U.S. District Court for the Eastern District of Virginia Alexandria Division and the U.S. Court of Appeals for the Fourth Circuit arbitrarily and capriciously applied a double standard against the respondent when it denied the respondent's Fed. R. Civ. P. Rule 60(b) Motion, effectively, abridging the respondent's privileges and immunities and due process as guaranteed by the U.S.

Constitution, the Fed. R. Civ. P., Virginia Constitution and the State of Virginia Statutes and case Law?

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ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI OF PETITIONER LORENZO W. TIJERINA

Petitioner Lorenzo W. Tijerina (hereinafter "Tijerina") hereby petitions this Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fourth Circuit affirming the U.S. District Court for the Eastern District of Virginia Alexandria Division denying

petitioner's Fed. R. Civ. P. Rule 60(b) Motion.

OPINIONS BELOW

The December 23, 1992, opinion of the Court of Appeals for the Fourth Circuit appears at Appendix A to this petition. The July 28, 1992, opinion of the Court of Appeals for the Fourth appears at Appendix B to this petition. The June 13, 1991, Order of the U.S. District Court's denying petitioner's Motion for Judgment notwithstanding the verdict appears at Appendix C to this petition. The May 30, 1991, judgment of the U.S. District appears at Appendix D to this petition. The January 2, 1991 Scheduling Order of the U.S. District Court at Appendix E to this petition. The August 2, 1991, decision of the Virginia Court of Appeals on Rehearing of the respondent's petition at Appendix E to this petition. The June 18, 1991 opinion

of the Virginia Court of Appeals on respondent's appeal at Appendix F to this petition. The May 14, 1991 memorandum opinion of the Virginia Court of Appeals at Appendix G to this petition. The July 20, 1991 Decree of divorce in Stowbridge v. Stowbridge, Chancery No. 110882, in the Circuit Court of Fairfax County Virginia at Appendix H to this petition.

JURISDICTION

The Court of Appeals' Opinion in this matter was filed on December 23, 1992. Accordingly, this Court's jurisdiction is invoked under Title 28, U.S.C. Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 28 U.S.C. Sec. 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or

value of $50,000, exclusive of interest and cost, and is between--

(1) Citizens of different States;

(2) citizens of a State and citizen or subject of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title [28 U.S.C.S. Sec. 1603(a)], as plaintiff and citizen of a State or of different States.

Rule 1:15 of the Rules of the Supreme Court of Virginia which provides in relevant part:

> "Counsel of record" includes a counsel or party who has signed a pleading in the case or who has notified the other parties and the clerk in writing that he appears in the case. Counsel of record shall not

withdraw from a case except by leave of court after notice to the client or the time and place of a motion for leave to withdraw.

Rule 60(b) of the Fed. R. Civ. P. provides in relevant part:

(b) Mistake Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic),

misrepresentation, or other misconduct of an adverse party;...(6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

And, fraud as defined in United States v. International Tel. & Tel. Corp., 349 F.Supp 22 (1972) the District Court held that if an attorney was implicated in the fabrication of evidence by a party, such implication could constitute fraud upon the Court.

While, at H.K. Porter Co. v. Goodyear Tire and Rubber Co., 536 F.2d 1115 (1976), the Court of Appeals held that attorneys are officers of the Court and that their allegedly dishonest conduct involving misrepresentations and/or perjury would

constitute fraud upon the Court.

Statement of the Case

Petitioner, Tijerina, is a member of the Pennsylvania Bar who maintains an Immigration Law office in Arlington, Virginia.

Respondent, Mrs. Yvonne Q. Stowbridge, is a law school graduate who at the time of bringing this action lived in Puerto Rico, with her daughter Carla, so as to evade the jurisdiction of the Virginia Fairfax County Circuit Court.

In May of 1989, respondent, engaged Mr. Kavrukov, a Virginia attorney, to represent her as her attorney in her divorce and custody suit in the Circuit Court of Fairfax County, Virginia. Because of respondent's medical history and attempted suicide she was granted temporary custody of her younger daughter Carla and only telephone visitation with her older daughter Andrea. Weekend and

Summer visitation with Carla was granted to Mr. Stowbridge.

Respondent was ordered by the Circuit Court of Fairfax County to undergo psychological evaluation *via* a Dr. Samenow. However, instead of submitting to the ordered evaluation respondent moved herself and Carla to Puerto Rico so as not to have to comply with the Circuit Court's Order.

In May of 1990, Mr. Stowbridge filed for a final decree of divorce and permanent custody of both Andrea and Carla. Upon learning of Mr. Stowbridge's petition, respondent filed suit in Puerto Rico for divorce and custody of Carla.

On June 1, 1990, respondent contacted petitioner *via* telephone, through her attorney in Puerto Rico, to have Mr. Stowbridge served with her "emergency Complaint for divorce". However, respondent claims she retained petitioner to represent her in the June 8, 1990, proceeding, before

the Circuit Court of Fairfax County in Virginia in reference to her husband's final decree of divorce and permanent custody of both Andrea and Carla.

At the June 8, 1990 proceeding, respondent was represented by her attorney of record, Mr. Ted Kavrukov, who failed to appear in her behalf. Mr. Kavrukov testified on the record that he had withdrawn from the underlying case, Stowbridge, supra. However, a transcript of the July 20, 1990 proceeding, proves differently. The Honorable Judge Quinlan H. Hancock did not allow Mr. Kavrukov to withdraw as respondent's attorney on June 8, 1990.

Furthermore, at the June 8, 1990 hearing, Judge Hancock did not execute the final decree of divorce for Mr. Stowbridge or grant permanent custody of Andrea and Carla to Mr. Stowbridge. Instead, Judge Hancock instructed Mr. Cook, Mr. Stowbridge's

attorney, to communicate to Mr. Kavrukov his non withdrawal from Stowbridge and if unsuccessful to return to the Court and then he, Judge Hancock, would execute the decree of final divorce with the permanent custody provisions.

On July 20, 1990, Mr. Stowbridge obtained his decree of final divorce and permanent custody of both Carla and Andrea. The record of the underlying case clearly reflects that respondent was still represented by Mr. Kavrukov and Mr. William D. Patkus. Again, Mr. Kavrukov failed to appear. However, Mr. Patkus did argue for a continuance, which was denied.

In November, 1990, respondent brought the instant action against petitioner claiming legal malpractice, fraud and negligence.

In May, 1991, trial was held and the jury ruled in favor of respondent. At the close of respondent's case in-chief, petitioner

moved for a direct verdict, which the Court denied

In June, 1991, petitioner filed his Motion for judgment not withstanding the verdict. Petitioner's Motion was denied.

In July, 1991, petitioner filed his Notice of Appeal. In July, 1992, the Court of Appeals affirmed the District Court's order.

On June 1, 1992, petitioner filed a Fed. R. Civ. P. Rule 60(b) Motion alleging that: Respondent's claim of surprise as to the respondent's "expert witness" during the trial was in-fact genuine. Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b) had been discovered. A fraud had been perpetrated upon the District Court by an officer of the Court, namely Ted Kavrukov a Virginia attorney. Petitioner's Motion was denied.

In July, 1992, petitioner, appealed the District Court denial of his Rule 60(b) Motion, and on December 23, 1992, the Court of Appeals affirmed the District Court's decision. Consequently, the instant appeal is taken.

A. Whether Or Not Petitioner's Rule 60(b) Motion Was Timely Filed Where Fraud Is An Issue _____ .

In its decision of December 23, 1992, the Court of Appeals For the Fourth Circuit affirmed the District Court's Holding denying petitioner's Fed. R. Civ. P. Rule 60(b) Motion [herein after referred to as Rule 60(b) Motion] on the ground that "...he did not file within a reasonable time. See McLawhorn v. John W. Daniel & Co., 924 F.2d 535, 538 (4th Cir. 1991); Central Operating Co. v. Utility Workers of America, 491 F.2d 245, 253 (4th Cir. 1974)." Notwithstanding, the fact that the Court of Appeals found

that the petitioner did in-fact file his Rule 60(b) Motion within one year of the jury verdict as required by the Rule.

As to the issues of timeliness and fraud upon the Court, petitioner alleged in his Rule 60(b) Motion that the respondent's "expert witness" and an officer of the Court perpetrated a fraud upon the District Court by lying on the witness stand. Petitioner cited Tas International Travel Service, Inc. v. Pan American World Airways, Inc., 96 FRD 205, 36 FR Serv.2d 1129 (SD NY 1982), where the District Court held that where movant's Rule 60(b) Motion is based on "...alleged perjurious testimony [movant] is not subject to due diligence standard." In the instant case, the movant-petitioner, clearly demonstrated that Mr. Ted Kavrukov, respondent's "expert witness" and only witness, the Virginia attorney in respondent's underlying case Stowbridge v.

Stowbridge, Chancery No. 110882, Circuit Court for Fairfax County, Fairfax, Virginia, lied about not being the respondent's attorney on June 8th, 1990, the date respondent alleges she lost custody of her minor child, Carla, to Carla's father. (See Appendix I, which was also submitted with petitioner's Rule 60(b) Motion to the U.S. District Court and with petitioner's appeal to the Court of Appeals as Exhibit A).

Effectively, Appendix I, reflects that Kavrukov was not allowed to withdraw on June 8, 1990, as respondent's attorney. Nevertheless, Kavrukov testified in the District Court, that he was allowed to withdraw as respondent's attorney from the respondent's underlying case, Stowbridge, supra. In fact, Kavrukov violated Rule 1:5 of the Rules Of The Supreme Court Of Virginia, which requires that: "Counsel of record shall not withdraw from a case except

by leave of court after notice to the client of the time and place of a motion for leave to withdraw."

Consequently, upon Kavrukov's intentional failure to acquire leave of Court in Stowbridge he became liable not only to the Court but also personally liable to his client, the respondent. The fact is unescapable that Kavrukov walked away from the Court when Stowbridge came to be heard before the Honorable Judge Quinlan H. Hancock, on June 8th and July 20, 1990. [See Appendix I, p. I-28, line 5-11, p. I-29, p. I-30, lines 1 and 2; also see Virginia Dep't of Cors. v. Crowley, 227 Va. 254, 316 S.E.2d 439 (1984); Davis v. Commonwealth, 215 Va. 816, 213 S.E.2d 785 (1975); Autry v. Bryan, 224 Va. 451, 297 S.E.2d 690 (1982)].

Therefore, in light of the fact that, the respondent was awarded a judgment based on

perjured testimony by Kavrukov, respondent's "expert witness", in order that he might escape liability; and, the fact that petitioner's allegations in his Rule 60(b) Motion is supported by the Virginia State Court Transcript, petitioner's Motion should have been granted; but for, the District Court's abuse of discretion.

B. Whether Due Diligence On Part Of The Movant To Discover New Evidence Is Shown Or May Be Inferred _____ .

The Docket Sheet in the instant case clearly reflects that the petitioner filed his First Set Of Interrogatories on March 8, 1990, and on March 11, 1990, petitioner filed his First Request For Production Of Documents. In said Interrogatories, petitioner requested the identity of any expert witness the respondent was going to call, a summary of the expert witness' testimony and the documents upon which the

expert witness would in-fact testify to. On March 21, 1990, respondent's attorney submitted the Witness List at Appendix K, p. K-1. Said List is void of any expert witness.

Accordingly, respondent should have been barred from calling Kavrukov as an expert witness as per the Scheduling Order at Appendix E, p. E-1. Clearly, the District Court applied a double standard that prejudiced the petitioner's case by making respondent utilize Kavrukov as an expert witness. (See District Court Transcript, p. 145, lines 1-3 inclusive). Effectively, the respondent entered the District Court on the day of trial to try a fraud, malpractice, and gross negligence case without an expert witness as required. However, the District Court in turn, over petitioner's objections, made the respondent adopt Kavrukov, an interested person as to the out come of the

case at Bar, as an "expert witness" who intentionally perjured himself. (See District Court Transcript, p. 157, lines 11-23 inclusive, p. 165, lines 18-23 inclusive, p. 166, lines 1-15 inclusive).

As to the State Court Transcript at Appendix I, Tas International Travel Service, Inc., supra, holds where movant Rule 60(b) Motion is grounded on "...alleged perjurious testimony is not subject to due diligence standard." Effectively, petitioner did make a timely request for the identity of expert witnesses, the Scheduling Order provides for no surprises as to witnesses especially expert witnesses. The respondent entered the District Court on the day of trial without an expert witness, whose testimony is required in malpractice and negligence cases, and the "expert witness" was an interested witness who did in-fact perjury himself.

Upon the Court's direction, respondent was forced to adopted her Virginia attorney, an officer of the Court, as her "expert witness" who is an interested person and who clearly appears to have committed perjury. Consequently, the District Court clearly abused its discretion when it allowed Kavrukov to testify over petitioner's objection and to petitioner's surprise.

C. Whether The Evidence Was Discovered Following The Trial _____ .

The complete file and transcript at petitioner's Appendix I, was not a public document and/or record on May 29th and 30th, 1991. The case file was held by the Judges of the Virginia Court of Appeals. Said Court did not release the file of the underlying case, Stowbridge v. Stowbridge, supra, because the Court was actively trying to decide the issues on appeal. The Virginia Court of Appeals did not release

the Stowbridge file until August, 2, 1991. (See Appendices F and G). Furthermore, petitioner did in-fact timely file discovery, i.e., within the time set in the Court's Scheduling Order. (See Docketing Sheet at March 22, 1991).

Effectively, the transcript at Appendix I, was in the respondent's complete dominion and control; was in-fact discovered after the instant trial; and, presents evidence which is not merely cumulative or impeaching. In-fact the transcript was presented to establish that a fraud appears to have been perpetrated upon the District Court by an officer of the Court whose testimony was material; and, if petitioner would have been granted a new trial due to perjured testimony would probably produce new results.

D. Whether The Evidence Is Not Merely Cumulative Or Impeaching _____ .

In the instant case, Kavrukov's testimony is crucial since the District Court made respondent's present attorney, Mr. Patkus, qualify Kavrukov as an expert witness to the petitioner's surprise and over petitioner's objection. Notwithstanding, the fact that Patkus stated on the record that Kavrukov was not an expert witness. (See Transcript at p. 144, lines 1-23 inclusive, p. 145, lines 1-3 inclusive). The District Court not only allowed Kavrukov to be considered an expert witness but adopted Kavrukov's false statements that he was allowed to withdraw from the underlying case. (See District Court's Transcript, p. 153, lines 9-23 inclusive).

At trial in the District Court, Kavrukov's was respondent's only witness to testify and he was not cited as an expert witness as required by the District Court's Scheduling Order of January 2, 1991. (See

Appendix E, p. E-2 and E-3). Specifically, the Scheduling Order provides that:

> No witness or exhibit not so listed and filed will be permitted at trial except for impeachment or rebuttal purposes. No witness, expert or otherwise, will be permitted to testify who, in response to a request for his identity, has not been identified in time to allow his deposition to be taken or the substance of his knowledge ascertained, or in the case of an expert, to allow the facts relied upon and opinions held by him to be obtained by F. R. Civ. P. 26(b)(4)(A) or deposition prior to the discovery cutoff.

Furthermore, respondent's Witness List is void of any expert witness as required to be cited by the Court's Scheduling Order. (See Appendix K, p. K-1). Effectively, petitioner did not have to impeach Kavrukov

since Kavrukov lied about not having to represent respondent and not noticed as to respondent's case before the Virginia Fairfax County Circuit Court. (See Appendix I, p. I-27, lines 20-23 inclusive; p. I-28; p. I-29 and p. I-30, line 1).

E. The Evidence Is Material

There is no question that the evidence is material. Respondent alleges in her complaint that she was not represented at the June 8, 1990, State Court Proceeding. The State Court Transcript reflects that the respondent was in fact represented by her own "expert witness", Kavrukov, who took it upon himself to walk away from the proceeding. (See Appendix I, p. I-27, lines 20-23 inclusive; p. I-28; p. I-29 and p. I-30, line 1). And, because of Kavrukov's absence nothing was heard as to Stowbridge on June 8, 1990. (See District Court Transcript, p. 154, lines 14-23 inclusive;

p. 155, lines 1-10 inclusive; and, Appendix I, p. I-27, lines 20-23 inclusive; p. I-28; p. I-29 and p. I-30, line 1). Furthermore, Appendix I clearly shows that Kavrukov is a witness with an interest in the outcome of the instant case and that Kavrukov violated Rule 1:5 of the Rules Of The Supreme Court Of Virginia.

The respondent did not properly submit Kavrukov as an expert witness as required by the District Court's Scheduling Order. As a matter of fact, it was the Court that informed Patkus, respondent's attorney, that respondent is required to present expert testimony in her malpractice and negligence claims. (See District Court Transcript, p. 141, lines 10-22 inclusive; p. 142, lines 1-2 inclusive). However, the Court would not dismiss respondent's claim upon petitioner's objection to Kavrukov or motions after respondent rested. (See District Court

Transcript pp. 18-30, lines 1-14 inclusive, p. 266, lines 16-23 inclusive; pp. 267-269, line 9 inclusive). Instead, the Bench adopted Kavrukov as an expert witness. Notwithstanding, the fact that: (a) During a recess, while Kavrukov was testifying, he and Patkus were observed by a Mr. Arthur P. Lander, Attorney, located at 614 S. 19th Street, Arlington, VA 22203, reading and discussing Stewart v. Hall, 770 F.2d 1267 (4th Cir. 1985), the case the Court suggested respondent read. (See District Court Transcript, p. 146, line 20-23 inclusive; p. 183, lines 6-23 inclusive; pp. 184-187, line 7 inclusive). (b) Kavrukov was in-fact respondent's attorney in the underlying State case, Stowbridge, supra. (See Appendix I). (c) The Virginia State Court Of Appeals held that respondent was in-fact represented by Kavrukov in the underlying State case, Stowbridge, supra.

(See Appendices F, G and I). (d) Kavrukov did not effectively withdraw from the underlying case as he testified in the District Court. (See Appendix I).

The fact that a fraud has been perpetrated upon the District Court by an officer of the Court, as the "expert witness" in a malpractice and negligence case is material to the outcome of respondent's claims and petitioner's instant Writ. Clearly, the petitioner provided the Federal District Court as well as the Court Of Appeals with enough evidence to support his claim that a fraud has been perpetrated upon the Court by an officer of said Court. However, both the Federal District Court and the Court of Appeals chose to ignore the evidence filed with petitioner's Rule 60(b) Motion and deny him equity.

Effectively, the District Court abused its discretion in light of petitioner's

evidence that a fraud has been perpetrated upon the Court by an officer of the Court.

F. The Evidence Is Such That A New Trial Would Probably Produce New Results.

In the instant case, because respondent's "expert witness" is in-fact an interested witness, who could be held liable to the respondent, the District Court should not have allowed him to testify as an expert witness. Furthermore, the record is crystal clear that Kavrukov did in-fact perjure his testimony and he being made to testify as an "expert witness" surprised petitioner. (See District Court Transcript, p. 145, lines 1-13 inclusive; p. 152, lines 9-19 inclusive; Appendix I, p. I-29, lines 12-18 inclusive). I.E., Kavrukov was not permitted to withdraw from the underlying case as he testified nor was he offered as an expert witness at anytime prior to being call to testify. Furthermore, Kavrukov knew he was not

allowed to withdraw as provided at Rule 1:5 of the Rules Of The Supreme Court Of Virginia; and, that the June 8th, 1990 Virginia State Proceeding at which respondent alleges she lost custody of her minor child did not take place as Kavrukov testified. (See Appendix I, p. I-29, lines 12-18 inclusive; and, District Court Transcript, p. 153, lines 13-23 inclusive; pp. 154-155, line 9). Effectively, the evidence in the State Court Transcript clearly reflects that the respondent was in-fact represented by her "expert witness", that she in-fact did not lose custody of her minor child, Carla on June 8, 1990, that respondent was in-fact represented by Patkus on July 20, 1990, that respondent was in fact in contempt of the Fairfax County Circuit Court Order, and that respondent failed to prove her case in accordance to the Holding in Stewart v. Hall, 770 F.2d

1267 (4th Cir. 1985). There is little, if any, doubt that; but for Kavrukov's perjured testimony a new trial would have produced new results.

G. Whether Or Not The U.S. District Court Arbitrarily And Capriciously Exercised Subject Matter Jurisdiction In The Instant Case In Light Of The Fact That The Respondent Did Not Suffer Damages Of At Least $50,000.00 As Required By 28 U.S.C. Sec. 1332, Over Petitioner's Challenge Via A Motion To Dismiss _____ .

The Supreme Court of Virginia held in Allied Productions, Inc. v. Duesterdick, 232 S.E.2d 774 (1977), that:

> When a client has suffered a judgment of money damages as the proximate result of his attorney's negligence, such judgment constitutes

actual damages recoverable in a suit for legal malpractice to the extent that the judgment has been paid.

Motion for judgment seeking damages for legal malpractice which did not allege any actual damages failed to state a claim of action.

Furthermore, 28 U.S.C. Sec. 1332 requires that where the Federal District Court exercises jurisdiction in diversity cases the matter in controversy exceed the sum of or value of $50,000 (exclusive of interest and cost). The record clearly shows that the respondent did not suffer the required $50,000.00 amount.

At page 90, lines 15-23, of the District Court Transcript, respondent cites her damages as approximately $13,000.00 including cost. Furthermore, examining the entire record of this case this Court will see where petitioner did in-fact challenge

the jurisdiction of the District Court based on diversity of citizenship and jurisdictional amount. (See 28 U.S.C. Sec. 1332; and, the Docketing Sheet at December 4th, 1990; February 4th, 1990; May 29, 1991; and June 10, 1991).

Additionally, at page 131, lines 6-11 of the District Court Transcript, respondent admits that her legal expenses are being paid by her parents not by the respondent; i.e., she suffered no actual monetary damages or losses. Payment of legal fees by respondent's parents to her attorney, if any, is not at the hands of the petitioner but as a gift to respondent from her parents and do not qualify as a measure of damages.

Additionally, the custody hearing for respondent's minor daughter, Carla, did not take place on June 8th, 1990; consequently, respondent did not suffer any detriment at the hands of the petitioner. (See District Court Transcript at p. 154, lines 14-21, and

See Appendix I at p. I-20, lines 4-7 inclusive).

Effectively, respondent did not sustain the required $50,000 in damages or injuries necessary to bring a diversity action. (See District Court Transcript at p. 90, lines 13-23).

At p. 90, lines 13-23 and p. 91, lines 1-15 of the District Court Transcript the Respondent admits to "...about $13,000" in damages. However, said amount also includes attorney's fees in her underlying State case, Stowbridge, and $5,000 in moving expenses to move from Puerto Rico to Virginia, to remove the taint of contempt caused by her own hand.

On December 4, 1990, petitioner moved the District Court via a Fed. R. Civ. P. Rule 12(b) Motion to dismiss respondent's Complaint for lack of personal jurisdiction; lack of subject matter jurisdiction for

failing to cite actual damages of $50,000; failing to join a necessary third party under Rule 19, namely Mr. Kavrukov; failing to state a claim upon which relief can be granted with Affidavit, in light of the fact that respondent did not lose custody of her minor child, Carla, on June 8, 1990 as she alleged; and, that respondent's loss, if any, was caused at her own hand by her intentionally being in contempt of the State Court Order. Effectively, the respondent was seeking "equity" in the U.S. District Court with "unclean hands". (See Appendices F, G, H and I; and Docket Sheet at December 14, 1990).

The Court denied petitioner's Rule 12(b) Motion. Nevertheless, petitioner has continuously raised the issue that the District Court lacks subject matter jurisdiction; that respondent's claims should have been dismissed for failing to

name a necessary third party as required at Rules 12 and 19 of the Fed. R. Civ. P.; and, that respondent's contempt of the State Court's Order bars her from reaching equity in the State of Virginia Courts and in the U.S. District Courts.

Accordingly, petitioner, again comes to challenge the jurisdiction of the District Court in light of the fact that respondent admitted to having only "about $13,000" in damages and that said amount included attorney's fees to bring her claim before the District Court. Effectively, respondent's admission clearly is legally sufficient to support petitioner's claim that the U.S. District Court lacks subject matter jurisdiction over respondent's claims and the Court has no other course but to dismiss respondent's Complaint in light of petitioner's continued challenge of the District Court's jurisdiction. (See

District Court Transcript, p. 90, lines 13-23 and p. 91, lines 1-15; and Docket Sheet at December 14, 1990).

Accordingly, by the U.S. District and Appeals Courts refusing to dismiss respondent's Complaint where she admits to having only "about $13,000" in damages prior to her Complaint being filed with the U.S. District Court, the Courts have abused their discretion by not granting the petitioner's Motion to dismiss. Legally, respondent's Complaint should be dismissed in light of the respondent's admission.

H. Whether Or Not The U.S. District Court Arbitrarily And Capriciously Exercised Jurisdiction Over The Instant Case In Light Of The Fact That The Respondent Fail To Join A Necessary Third Party, Mr. Ted Kavrukov, The Respondent's "Expert Witness", Over Petitioner's

Objections And Challenges Via Petitioner's Fed. R. Civ. P., Rule 12(b) Motion To Dismiss _____ .

During the trial of the instant case, respondent's "expert witness", Mr. Kavrukov, a Virginia attorney, was asked on cross examination whether or not he was in-fact allowed to withdraw from the underlying case Stowbridge v. Stowbridge, supra.. Kavrukov at p. 174, line 7 through p. 175, line 14, of the District Court Transcript answered:

BY MR. TIJERINA:

Q. Were you allowed to withdraw on June the 8th?

A. The judge told me that he would sign the order if I left the order with him. I left the order with him, and I left the courtroom.

THE COURT: How did you interpret that?

THE WITNESS: I interpreted that as I being allowed to withdraw. The judge

simply said leave the order here and I'll sign it.

THE COURT: And the order was to what effect?

THE WITNESS: The order was relieving me from representation in the case....

THE COURT: Your testimony, am I correct, Mr. Kavrokov, is that you didn't represent her after that day?

THE WITNESS: That's correct, your Honor....

However, Appendix I, attached hereto, at p. I-26, line 13 through p. I-30, line 2, clearly reflects that Kavrukov was being less than truthful with the Court:

MR. COOK: May I respond, Your Honor?

THE COURT: Yes, sir.

MR. COOK: Thank you. I appreciate the difficulty Mr. Patkus finds himself in coming into this case so late. I do not appreciate, however, representations

regarding what I knew or didn't know which are totally erroneous.

The reference to Judge Brown is completely misleading, Your Honor. This case was noticed for June 8th, a praecipe was filed with the Clerk's office asking that it be placed on your docket as has been requested of counsel by the Clerk's office. Notwithstanding the filing of that praecipe that it be heard by you because it needed to be heard by you, the case was placed on Judge Brown's docket. I met with Mr. Kavrokov in Judge Brown's courtroom, I endorsed his order because frankly I've been there, I know what it's like to have a client who no longer communicates with you.

I endorsed his order, he endorsed my decree of divorce and in front of

Judge Brown when he called the case I indicated that it had to be heard by you.

Judge Brown heard absolutely nothing with regard to the motion to withdraw, made no oral rulings regarding Mr. Kavrokov's withdrawal.

I brought the file down here, Mr. Kavrokov decided that he didn't want to waste any more time on this case, which I can also understand because I imagine he hasn't been paid, and he left.

Your Honor told me that you would not enter his order and requested that I inform Mr. Kavrokov which I did by telephone that afternoon and I confirmed it by letter to him on the 13th, a copy of which I have as well.

To say that I know that Mr. Kavrokov was no longer of record because of

something Judge Brown said is totally erroneous....

Effectively, Mr. Cook, a Virginia attorney, informed Kavrukov telephonically and in writing that he, Kavrukov, was not allowed to withdraw from the underlying case. Furthermore, Mr. Patkus, respondent's attorney in the case at Bar, had first hand knowledge that Kavrukov was not allowed to withdraw from Stowbridge, supra.. Yet, when the Court asked Kavrukov if his motion to withdraw was heard. Kavrukov answered in the affirmative. An answer which is not supported by the facts.

Accordingly, since Kavrukov was in-fact respondent's attorney on June 8, 1990 and on July 20, 1990, he was and continues to be a necessary third party in respondent's claim against petitioner. Therefore, the District Court abused its discretion when it refused to grant petitioner's Motion to dismiss

respondent's claim for failure to join a necessary third party.

I. Whether Or Not The U.S. District Court Arbitrarily And Capriciously Refused To Dismiss Respondent's Claim, Upon Petitioner's Motion To Dismiss, Against The Respondent In Light Of The Fact That Respondent Entered The U.S. District Court With "Unclean Hands" Via Her Contempt Of A State Court Order.

Respondent entered the District Court with "unclean hands". Respondent admits at page 68 of the District Court Transcript, lines 11-14, that she left Virginia to evade its jurisdiction.

In Brown v. Kittle, 225 Va. 451, 303 S.E.2d 864 (1983); McNeir v. McNeir, 178 Va. 285, 16 S.E.2d 632 (1941), the Virginia Courts held that, ""[u]nder equitable

doctrine of "unclean hands," party is denied relief because of his own inequitable conduct."" And, that, "[w]ithholding of equitable relief to punish wrongdoer may be approved in cases involving issues of family law, but not where rights of children are prejudiced by the result."

Effectively, on June 8th, 1990, there was no evidence before the State Court for the Circuit of Fairfax County that respondent would have been granted permanent custody of Carla or visitation rights to see her older daughter Andrea. Respondent did not comply with the State Court's order of having a psychological evaluation by Dr. Samenow, or allowing her spouse, Mr. Stowbridge visitation of Carla. As a matter of fact, respondent admitted leaving the jurisdiction of the Virginia Courts to evade its Order. (See District Court Transcript at p. 68, lines 11-18).

Respondent presented no evidence that the underlying case would have been decided in her favor. The record is clear the respondent presented nothing that would be required for her to maintain temporary custody of Carla or obtain custody of Andrea. I.E., respondent failed to present the required psychological report from Dr. Samenow, home studies, financial statements, school grades, testimony from teachers or other witnesses to attest to respondent's and Carla's relationship to each other and their peers. Consequently, the trier of fact could not effectively rule as to whether or not the underlying case would have been decided in respondent's favor as required in

Stewart v. Hall, 770 F.2d 1267 (4th Cir. 1985).

Furthermore, on May 14 and June 18, 1990, the Virginia Court of Appeals upheld the Fairfax County Circuit Court Decree granting

Mr. Stowbridge permanent custody of his daughters Carla and Andrea. (See Appendices F, G, H and I). The Virginia Court of Appeals found that respondent was in-fact represented by Mr. Kavrukov; respondent was in contempt of the Fairfax County Court; and that respondent was presently unfit.

Effectively, the U.S. District Court is bound by the substantive laws generated by the Virginia Court of Appeals in Stowbridge. Therefore, respondent's claims as to petitioner should be dismiss in line with Stewart v. Hall, 770 F.2d 1267 (4th Cir. 1985) and Stowbridge, supra.. (See Appendices F, G, H, I and J).

Accordingly, by not dismissing or vacating the judgment against the petitioner the Federal Courts has held petitioner to a double standard whereby the Federal Courts do not have to follow the substantive law of the state in which they sit. Such rational

and action on the part of the Federal Courts is a clear abuse of discretion. [See Erie Railroad Co v. Tompkins, 304 U.S. 64 (1938)]

In Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538 (1941) where this Court held that the Federal Courts are bound by the substantive rulings of the state's highest court. Even if a State decision is handed down after the Federal trial Court's decision, a Court of Appeals must apply the state ruling. This Court went on to say that if no decision on point by the highest state court, the Federal Court should look to the decisions of lower State Courts or, if there are none, to relevant dicta and analogous decisions in that State, and to decisions in other influential or neighboring, jurisdictions. Effectively, the Federal Courts must adopt the rule that it believes the State Court would adopt.

At Bar, respondent, because of her

contempt to of the State Court Decree, would not have been able to seek equity and be granted custody of her minor daughters. Therefore the U.S. District Court abused its discretion by not holding to Virginia State substantive law.

J. Whether On Not Petitioner Can Be Held Liable For A State Hearing That Did Not Occur; Specifically, The June 8th, 1990 State Court Hearing, Did Not Take Place As Respondent Contends.

Respondent did not lose temporary custody of her daughter, Carla, at the June 8, 1990 State Court Hearing in Stowbridge, supra, contrary to her and Mr. Kavrukov's testimony on the record (See Appendix I, p. I-9, lines 2-10, p. I-20, lines 4-7, and See District Court Transcript at p. 154, line 18-21); effectively, respondent's matter was set for final disposition on July 20th, 1990 (See

Appendix I).

Effectively, since the custody hearing for respondent's minor daughter, Carla, did not take place on June 8th, 1990; respondent did not suffer any detriment at the hands of the petitioner. (See District Court Transcript at p. 154, lines 14-21, and See Appendix I at p. I-20, lines 4-7).

K. The Decision Below Concerns An Important Issues Affecting The Right To Due Process And Privileges And Immunities Guaranteed By The U.S Constitution, Virginia Constitution, and Virginia Statutes To Individuals Not Citizens Of The State Of Virginia _____ .

In Maryland Casualty Co. v. Price, et al., 231 Fed. 397 (4th Cir. 1916), this Court held that in a legal malpractice

action for the plaintiff to recover against the defendant attorney, the plaintiff must prove; (1) the attorney's employment, (2) defendant's neglect of a reasonable duty, and (3) that defendant's negligence resulted in and was the proximate cause of plaintiff's loss. Furthermore, in Byrd v. Martin, Hopkins, Lemon and Carter, P.C., 564 F.Supp. 1425 (W.D. Va. 1983), the District Court held that in diversity legal malpractice actions Virginia law requires the Court to assess the merits of the underlying claim.

> Accordingly, if an attorney, in disregard of his duty, neglects to appear in a suit against his client, with the result that a default judgment is taken, it does not follow that the client has suffered damages, because the judgment may be entirely just, and one that would have been

rendered notwithstanding the efforts of the attorney to prevent it. (231 Fed. 402).

Here, respondent's claims are not supported by facts. By respondent's own Exhibits at Exhibit 20, the decision of the Virginia Court of Appeals reflects that respondent was in-fact represented by her Virginia attorney, Mr. Ted Kavrukov, respondent's expert witness. Furthermore, there exist sufficient evidence which reflects that respondent did not lose permanent custody of her daughter, Carla, on June 8, 1990. (See Appendix I). The State Court in the underlying case Stowbridge did not hear the merits of the issue of permanent custody of Carla to the respondent on June 8, 1990. The Honorable Judge Quinlan H. Hancock of the Circuit Court of Fairfax County did not sign an Order granting permanent custody of Carla to the respondent's former spouse, on June 8, 1990.

(See Appendix I at p. I-9, lines 1-14).

Furthermore, in United States v. Barge Shamrock, 635 F.2d 1108 (4th Cir. 1980); Furka v. Great Lakes Dredge & Dock Co., 755 F.2d 1085 (4th Cir. 1985); and, United States v. One 1971 Mercedes Benz, 542 F.2d 912 (4th Cir. 1976), this Circuit hold that generally the Court of Appeals does not pass on issues previously raised. However, where error is "plain" and refusal to treat it would result in denial of fundamental justice, this Court should decide it. (See 635 F.2d 1111; and 755 F.2d 1089).

At Miller v. Premier Corp., 608 F.2d 973 (4th Cir. 1979), this Circuit held that where error is "plain" and if the Court's refusal to consider such would result in the denial of fundamental justice then the Court will consider issues raised for the first time on appeal.

The Circuit also held that:

Despite plaintiffs' argument that defendant did not properly preserve question issue as to the sufficiency of evidence on fraud claim because of defendant's failure to move for a directed verdict prior to moving for judgment notwithstanding the verdict, fairness required that the Court of Appeals consider defendant's contentions respecting sufficiency of the evidence where no written motions were filed and oral motions were made in a colloquy that was too confusing to permit confident assessment. (608 F.2d 974)

Question whether evidence was sufficient to permit a jury rationally to find for plaintiffs on their common-law fraud claim was a question of law which, when presented to the Court of Appeals, was identical to the

question presented to the district court by motion for judgment n.o.v.. (608 F.2d 976).

In Modave v Long Island Jewish Medical Center, 501 F.2d 1065 (2d Cir. 1974), the Court held that a "fundamental error" may be considered on appeal even in absence of objection at trial where error is so serious and flagrant that it goes to the very integrity of the trial. (See 501 F.2d 1072). Furthermore, this Court in Ricard v. Birch, 529 F.2d 214 (4th Cir. 1975), held that traditionally, this Court "...does not pass on questions that were not considered by the District Court; however, orderly rules of procedure do not require sacrifice of the rules of fundamental justice." (See 215 at 529 F.2d 214).

At Washington Gas Light v. Virginia Electric & Power Co., 438 F.2d 248 (4th Cir. 1971), this Court held that, "...[i]f necessary to reach correct result, [this

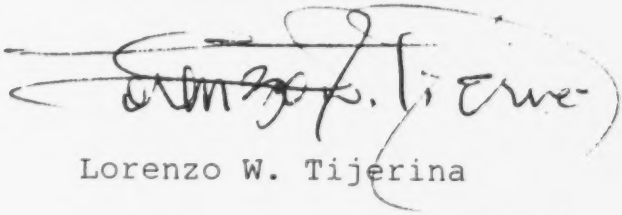
Court] may sua sponte consider points not presented to the district court and not even raised on appeal by any party." Respondent claims she had her witnesses lined up to testify; however, she failed to present one scintilla of such evidence. Effectively, the respondent's Virginia attorney and attorney of record, Mr. Kavrukov, her "expert witness" did not examine one piece of evidence that would show that the underlying case would have been decided otherwise. Accordingly, petitioner is asking this Court to examine the record and evidence as presented by the respondent and decide if in-fact the jury was provided enough evidence to decide whether the underlying case would have been decided otherwise had petitioner appeared.

CONCLUSION

This case presents important questions regarding diversity litigation brought

before the Federal Courts where the Federal Courts fail to apply state substantive law and therefore sets double standards as to the litigants in diversity cases.

Respectfully submitted,



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